

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MELANIE A. OCHS,

Petitioner,

V.

WARDEN JO GENTRY, et al.,

Respondents.

Case No. 2:16-cv-00982-JCM-CWH

ORDER

17 Before the court are the amended petition for writ of habeas corpus (ECF No. 18),
18 respondents' motion to dismiss (ECF No. 20), and petitioner's opposition (ECF No. 24).
19 Petitioner's grounds are addressable in federal habeas corpus and are not procedurally defaulted.
20 The court denies the motion.

21 Respondents first argue that grounds 1, 3, 4, and 5.2¹ are not addressable in federal habeas
22 corpus because they are state-law claims that petitioner has tried to convert into federal claims by
23 mentioning provisions of the Constitution of the United States. The court agrees with petitioner
24 that that was all she needed to do. Respondents' arguments should be presented as arguments on
25 the merits of these grounds in their answer.

¹ Respondents re-numbered ground 5.2 as ground 5(b). To avoid future confusion, respondents should use petitioner's numbering of the grounds.

1 Respondents next argue that ground 3 is procedurally defaulted. A federal court will not
2 review a claim for habeas corpus relief if the decision of the state court regarding that claim
3 rested on a state-law ground that is independent of the federal question and adequate to support
4 the judgment. Coleman v. Thompson, 501 U.S. 722, 730-31 (1991). Ground 3 is a claim that the
5 prosecution's expert witnesses were allowed to opine on petitioner's guilt, in violation of the
6 Fifth, Sixth, Eighth, and Fourteenth Amendments. On direct appeal, the Nevada Supreme Court
7 held:

8 Ochs also contends that the district court abused its discretion by allowing the
9 State's experts to give their opinion on her guilt or innocence. Because Ochs
10 failed to object below, we will not review her contention on appeal. See Flanagan
v. State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996).

11 Ex. 5, at 4 n.3 (ECF No. 21-5, at 5). In Flanagan, the Nevada Supreme Court stated, "Failure to
12 object or to request an instruction precludes appellate review, unless the error is patently
13 prejudicial and requires the court to act *sua sponte* to protect a defendant's right to a fair trial."
14 930 P.2d at 700. This is, with some changes in wording, the same as the plain-error standard of
15 review that the Nevada Supreme Court described a few years later:

16 Generally, the failure to clearly object on the record to a jury instruction precludes
17 appellate review. However, "this court has the discretion to address an error if it
18 was plain and affected the defendant's substantial rights." In conducting plain
error review, we must examine whether there was "error," whether the error was
19 "plain" or clear, and whether the error affected the defendant's substantial rights.
Additionally, the burden is on the defendant to show actual prejudice or a
miscarriage of justice.

20 Green v. State, 80 P.3d 93, 95 (2003). Therefore, a denial of a ground with a citation to Flanagan
21 is not a blanket denial. It is a determination that petitioner did not meet the plain-error standard.
22 This court may "consider a claim on federal habeas that has been reviewed by a state appellate
23 court on the merits for plain error. Although applying a different standard of review than it would
24 on direct appeal, a state appellate court reviewing for plain error reaches the merits of a
25 petitioner's claim." Walker v. Endell, 850 F.2d 470, 474 (9th Cir. 1987). Ground 3 is not
26 procedurally defaulted.

27 Respondents will need to answer the petition. Under Rule 5(c) of the Rules Governing
28 Section 2254 Cases in the United States District Courts, respondents need to file portions of the

1 transcripts that they consider relevant. The transcript of the jury trial is relevant to petitioner's
2 claims. The transcript of any hearing in the post-conviction habeas corpus proceedings is relevant
3 to petitioner's claims of ineffective assistance of counsel. Respondents will need to file at least
4 those transcripts with their answer.

5 IT THEREFORE IS ORDERED that respondents' motion to dismiss (ECF No. 20) is
6 **DENIED.**

7 IT FURTHER IS ORDERED that respondents shall have forty-five (45) days from the
8 date of entry of this order to file and serve an answer. The answer will comply with Rule 5 of the
9 Rules Governing Section 2254 Cases in the United States District Courts. The answer also will
10 include with the transcripts that the court described above. Petitioner shall have forty-five (45)
11 days from the date on which the answer is served to file a reply.

12 DATED: September 19, 2018.

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14 JAMES C. MAHAN
15 United States District Judge

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